Filed 5/15/09 In re Diego A. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re DIEGO A., et al., a Person Coming Under the Juvenile Court Law.	B211429 (Los Angeles County Super. Ct. No. GJ26649)
THE PEOPLE, Plaintiff and Respondent, v. DIEGO A., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Leventer, Juvenile Court Referee. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Julie A. Harris, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

The juvenile court sustained a petition pursuant to section 602 of the Welfare and Institutions Code charging defendant and appellant Diego A. (minor) with felony counts of having a concealed firearm on his person (Pen. Code, § 12025, subd. (a)(2)) and possession of a firearm by a minor (Pen. Code, § 12101, subd. (a)(1)).[1] Minor contends that the juvenile court erred by denying minor's motion to suppress a .32 caliber Derringer pistol found by police on minor's person during a pat down search. Minor argues that he was unlawfully detained by police at the time of the search and that his consent to the search was not voluntary. We hold that the juvenile court did not err in denying the motion to suppress and therefore affirm the judgment.

BACKGROUND

A. The Prosecution Case

Pasadena Police Officer Joaquin Gurrola and his partner, Officer Jeremy Watties, were assigned to a special enforcement section focusing on gangs and narcotics. At approximately 6:00 p.m. on Friday, September 19, 2008, the officers were patrolling in uniform in a marked car on East Washington Boulevard in Pasadena. Officer Gurrola previously had made a few marijuana arrests in the area.

While driving eastbound, Officer Gurrola saw minor and another male, Alvaro I., in front of an apartment building at 264 East Washington. They were in the entry way to the apartment building, which was approximately 10 feet across and bounded on either side by low walls approximately one or two feet high. Officer Watties testified that one

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[1] All further statutory references are to the Penal Code, unless stated otherwise. The juvenile court dismissed two additional counts charging minor with carrying an unregistered and loaded firearm (§ 12031, subd. (a)(1)) and possession of live ammunition by a minor (§ 12101, subd. (b)(1)).

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of the walls was "really less than one foot" high and more "like a brick planter" than a retaining wall.

The officers stopped their patrol car to speak to the young men. Officer Gurrola asked Alvaro if he lived in the building. Alvaro answered, "No." Officer Gurrola noticed a strong odor of marijuana. Officer Gurrola asked Alvaro if he had any marijuana on him; Alvaro said he did not. Officer Gurrola asked Alvaro for consent to pat him down; Alvaro said, "Go ahead." Minor stated something to the effect that "they weren't up to no good." Officer Gurrola discovered a small baggy containing a green leafy substance resembling marijuana in Alvaro's front left pocket. Officer Gurrola placed Alvaro under arrest and handcuffed him.

Officer Gurrola asked minor if Officer Watties could pat him down. Minor stood up, turned his back to Officer Watties, spread his feet and put his hands behind his head with his fingers interlaced. Officer Watties asked minor if he had any illegal items on him; minor nodded his head in the affirmative. Officer Watties asked minor where the illegal items were; minor looked down toward his front right pocket. Officer Watties began to pat down minor's waistband. Minor said, "Fuck." Officer Watties removed a .32 caliber Derringer double barrel pistol from minor's front right pocket. Officer Watties handcuffed minor and placed him under arrest.

B. The Defense Case

Minor testified that, when the officers approached, Alvaro was on the phone and the officers told him "to get off the fucking phone." Officer Gurrola asked the young men if they lived in the building; minor responded that he did. Although both young men were already sitting down, the officers told them to sit down and stay where they were. Officer Gurrola told Alvaro to stand up and asked if he (Officer Gurrola) could search him (Alvaro). Alvaro said, "Yes." Minor asked the officers "if they could search us because we were doing nothing illegal besides just sitting down." Officer Gurrola responded, "I don't give a fuck. We're still going to search you." Officer Gurrola asked minor if Officer Watties could search him (minor); minor did not respond verbally, but

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when Officer Watties approached minor stood, put his hands behind his head, and stepped back toward Officer Watties. Officer Watties asked minor if he had any illegal narcotics or weapons. Minor said that he did. Officer Watties patted minor down and discovered the handgun in his pocket.

C. The Juvenile Court's Ruling

Minor made a motion to suppress the handgun pursuant to Welfare and Institutions Code section 700.1. After hearing the testimony, the juvenile court ruled, "Both officers testified to a consensual search. And the minor testified that, essentially, that they were lying. . . . So, essentially, it's a credibility call. [¶] . . . I'm going to find that the officers are more credible. So the motion to suppress is denied."

The parties stipulated that the juvenile court could consider the testimony on the motion to suppress as if it were a trial. The juvenile court sustained the allegations in the petition that minor violated sections 12025, subdivision (a)(2) and 12101, subdivision (a)(1), and classified the former violation as a felony. The juvenile court declared minor a ward of the court and placed him on home probation and imposed a restitution fine of $100. Minor timely appealed.

DISCUSSION

A. Standard of Review

"In ruling on a motion to suppress, the trial court finds the historical facts, then determines whether the applicable rule of law has been violated. [Citation.] 'We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]' [Citation.]" (*In re Raymond C.* (2008) 45 Cal.4th 303, 306; *People v. Zamudio* (2008) 43 Cal.4th 327, 342 ["Whether a seizure occurred within the meaning of the Fourth Amendment is a mixed question of law and fact qualifying for independent review"].) "If there is

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conflicting testimony, we must accept the trial court's resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them." (*People v. Zamudio, supra,* 43 Cal.4th at p. 342.)

B. Whether Minor Was Unlawfully Detained

Minor argues that his encounter with Officers Gurrola and Watties was not consensual but constituted an unlawful detention. Because he was unlawfully detained, minor contends, the handgun found in his pocket was tainted by illegality and should have been suppressed.

"Where, as here, the prosecution relies on consent to justify a warrantless search . . . , it bears the 'burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority. [Citation.]' [Citation.] Consent that is the product of an illegal detention is not voluntary and is ineffective to justify a search or seizure. [Citation.] Where an illegal detention occurs, unless 'subsequent events adequately dispel the coercive taint of the initial illegality, i.e.—where there is no longer causality—[*sic*] the subsequent consent is' ineffective. [Citations.]" (*People v. Zamudio, supra,* 43 Cal.4th at p. 341.) The first issue is thus whether minor was unlawfully detained when he consented to the pat down search. (*Ibid.*)[2]

The California Supreme Court explained the relevant legal principles as follows: "Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty

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[2] Defendant does not contest that he manifested consent to the search when he turned his back to Officer Watties, spread his feet and put his hands on his head. (See *People v. Frye* (1998) 18 Cal.4th 894, 990, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Harrington* (1970) 2 Cal.3d 991, 995 [consent "may be expressed by actions as well as words"].) He challenges only the validity of that consent.

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whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] Our present inquiry concerns the distinction between consensual encounters and detentions. Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citation.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see also *Florida v. Bostick* (1991) 501 U.S. 429, 434; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 341; *People v. Rivera* (2007) 41 Cal.4th 304, 309.)

Applying these principles and viewing the evidence most favorably to the juvenile court's order, we conclude that minor was not detained when he consented to the pat down search. Only two officers were present. Neither officer displayed a weapon.

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Neither officer told minor expressly or in effect that minor was not free to leave if he wished to do so. Neither officer touched minor until after minor gave his consent to the search. (See *People v. Colt* (2004) 118 Cal.App.4th 1404, 1411.) The juvenile court found that minor's testimony to the contrary was not credible.

We are not persuaded by minor's argument that a reasonable person would not have felt free to leave because the officers had, in effect, penned minor and Alvaro in a "discrete area" bounded by a "closed gate" and "two retaining walls." The location was not inherently coercive. Alvaro and minor were on a public street, in daylight, just outside the building where minor lived. (See *United States v. Drayton* (2002) 536 U.S. 194, 197-198, 203-204 (*Drayton*) [no seizure when three police officers boarded a bus and systematically questioned passengers]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 [no seizure when officer approached suspect on the street and asked suspect questions concerning a crime]; *People v. Capps* (1989) 215 Cal.App.3d 1112, 1121 [no detention when officer accompanied defendant over her objection while walking in a public place].) The "retaining walls" to which minor refers were less than two feet high. Officer Watties testified that, if minor wished to leave, he simply could have stepped over the walls. Minor's argument also ignores the fact that the "closed gate" behind minor was not a barrier to minor, but was the entrance to the apartment complex in which he lived. Had minor wished to leave, all he had to do was open the gate and go home. Courts have found that suspects were not involuntarily detained by police in circumstances far more confining than those in this case. (See, e.g., *Drayton*, *supra*, 536 U.S. at pp. 197-199 [no seizure when defendant was on a bus with three officers]; *People v. Fierro* (1991) 1 Cal.4th 173, 217 [no seizure when suspect interrogated in office at police station]; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 117-128 [encounter with police was "consensual" although suspect consented to search while in a locked eight-by-eight police interrogation room]; *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1124-1125 [minor was not "seized" when interrogated in police station commander's office]; *People v. Profit* (1986) 183 Cal.App.3d 849, 865-866 [no detention when suspects were questioned by law enforcement agents in airport boarding area].)

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Not determinative is Officer Watties's testimony that, while Officer Gurrola spoke to Alvaro and minor, his role was (as characterized by minor) "to control the immediate area." Read in context, Officer Watties's testimony was that his role was to watch minor and "anybody else in the general area" to ensure his own safety and that of his partner. In any event, whatever Officer Watties's subjective intent, his *conduct* was merely to stand back and observe. Officer Watties did not tell minor that he was not free to leave, nor was there any evidence that Officer Watties took any action that, viewed objectively, communicated that message to minor. Accordingly, we conclude that minor was not unlawfully detained when he consented to the pat down search.

The Attorney General suggests that even if minor was detained, the officers had reasonable suspicion to justify the detention. We do not have to reach this issue as we have held that there was no detention.

C. Whether Minor's Consent Was Voluntary

Minor argues that, even if he was not unlawfully detained, his consent was nevertheless involuntary because it was "nothing more than his submission to police authority." Minor contends that "the arrest of the minor's friend [Alvaro] and the fact that the officers' testimony establishes that the officers had the area under control is a significant factor showing that [minor's] 'consent' was not voluntary." We disagree.

The U.S. Supreme Court's decision in *Drayton, supra,* 536 U.S. 194, is factually similar to the instant case. In that case, the defendants, Drayton and Brown, were seated next to one another traveling on a Greyhound bus from Ft. Lauderdale, Florida to Detroit, Michigan. The bus made a scheduled stop in Tallahassee, Florida, where three officers of the Tallahassee police department boarded the bus. The officers were in plain clothes, but their badges were visible and they carried concealed weapons. One of the officers knelt on the driver's seat facing the back of the bus; another officer stood in the rear of the bus facing forward. The third officer—Officer Lang—moved systematically down the aisle, asking passengers about their travel plans and matching the passengers with their luggage in the overhead racks. (*Id.* at pp. 197-198.)

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Officer Lang identified himself as a police officer and showed his badge to Drayton and Brown. Officer Lang asked if they had any bags on the bus. Drayton and Brown both identified a green bag on the overhead rack. Officer Lang asked, "Do you mind if I check it?" Brown responded, "Go ahead." Officer Lang handed the bag to one of the other officers who checked the bag and found no contraband. (*Drayton, supra,* 536 U.S. at pp. 198-199.) Officer Lang noticed, however, that both Drayton and Brown were wearing heavy jackets and baggy pants despite the warm weather. Officer Lang asked Brown if he had any drugs or weapons in his possession, and inquired, "Do you mind if I check your person?" Brown answered, "Sure." Brown leaned up in his seat, removed his cell phone from his pocket, and opened his jacket. (*Id.* at p. 199.) Officer Lang patted down Brown's jacket, pockets, waist area, sides and upper thighs. Officer Lang felt hard objects similar to drug packages he had detected in other cases. He arrested and handcuffed Brown. (*Ibid.*)

Officer Lang then asked Drayton, "Mind if I check you?" (*Drayton, supra,* 536 U.S. at p. 199.) Drayton made no verbal response, but instead lifted his hands about eight inches from his legs. Officer Lang conducted a pat down search of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him off the bus. The hard objects proved to be bundles of powder cocaine. (*Ibid.*)

The Supreme Court held that Drayton's consent to the search was voluntary. (*Drayton, supra,* 536 U.S. at p. 206.) "Nothing Officer Lang said indicated a command to consent to the search. . . . [W]hen Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him . . . , and Drayton agreed." (*Ibid.*)

The decision in *Drayton, supra,* 536 U.S. 194, is dispositive here. As minor, Drayton was confronted by police officers in a defined space. As in this case, Drayton's friend (Brown) consented to be searched; the search discovered contraband; and the friend was handcuffed and arrested in Drayton's presence. As in this case, after the

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friend's arrest, police asked Drayton to consent to be searched. As in this case, police did not communicate to Drayton that his consent was required. As minor, Drayton manifested consent through a gesture that, in effect, invited police to conduct the search. As minor, Drayton was not told by police that he could refuse to consent. (*Id.* at pp. 206-207.) The Supreme Court held that Drayton's consent was voluntary. "Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable." (*Id.* at p. 207.) As in *Drayton*, we reject minor's contention and conclude that minor's consent was voluntary. The trial court properly denied minor's motion to suppress.

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.